

In the Matter of Arbitration

between

Relief Association

and

City of Shangri-la

Marshall Dillion, Grievant

John F. Wormuth
Arbitrator

Arbitrator's Case No. A-02-100
C.S.M.C.S Case No. ARB-01-0243

June 25, 2002

INTRODUCTION

This Arbitration arises from a grievance filed by The Relief Association, hereafter referred to as Association, on behalf of Marshall Dillion, here after referred to as the Grievant, grieving the disciplinary demotion from Salary Step 5 to Salary Step 4 Police Officer, effective October 7, 2001(JT EX D). This salary step reduction imposed by the City of Shangri-la, hereafter referred to as City, is for an alleged violation of the Shangri-la Police Department's General Procedures, specifically Procedure 030: "City of Shangri-la Police Department Harassment Prevention Policy" and Procedure 405: "Use of Mobile Terminal Datas" that occurred on July 11, 2001. Authority for this Arbitration is the Memorandum of Understanding between the City and the Association, and the Personnel Rules of the City. This arbitration was heard on April 16, 2002, commencing at 10:35 a.m. at the offices of the City of Shangri-la, 808 South Happy Avenue, Shangri-la, California, 00000.

The parties, from a list submitted by the California State Mediation and Conciliation Service, Case Number ARB-01-0243, unanimously selected John F. Wormuth as the Arbitrator in this arbitration to render an award. The parties agreed that this arbitration is timely and properly before the Arbitrator, and that all procedural requirements have been met. There were no post hearing or closing briefs submitted and no other briefs or submissions were requested. Amble Henry, CSR No. 0000, transcribed the hearing and the original transcript was received by the Arbitrator on May 17, 2002 and is the official record of this arbitration.

The parties were given full opportunity to present evidence, examine and cross-examine witnesses, produce exhibits and present argument, and availed themselves of the opportunity to do so. The City and the Association introduced no individual Exhibits, but did jointly introduce exhibits A thru M, all of which were admitted into evidence and are incorporated herein by reference.

APPEARANCES

ON BEHALF OF THE CITY OF SHANGRI LA:

,
Assistant City Attorney

ON BEHALF Of THE RELIEF ASSOCIATION

AND MASHALL DILLION, GRIEVANT

Attorney at Law

ISSUE

The parties have agreed that the issue before the Arbitrator is:

“Is the discipline for just cause, (and) if not, what is the appropriate penalty?” (TR 11:2:3:4)

1 **FACTUAL BACKGROUND**

2 The Grievant has been employed as a Police Officer with the City of Shangri-la
3 for approximately seventeen and one half (17 ½) years. Prior to his employment by the
4 City the Grievant began his career as a Police Officer in Dodge City and remained in
5 their employ for approximately two and one half (2 1/2) years. With exception of a five
6 (5) month period of time, during which the Grievant pursued a private business venture,
7 he has, during the past two decades, been employed as a Police Officer. The Grievant
8 was hired as an experienced Police Officer by the City of Shangri-la and he received
9 credit for his employment with Dodge City, advancing almost immediately to the top step
10 of the salary schedule. Throughout the majority of his employment with the City, the
11 Grievant has been at the highest salary schedule step for Police Officer.

12 On July 11, 2001, the Grievant used the Mobile Data Terminals, hereafter
13 referred to as MDT, to send two messages to the Dispatch Center that the Chief of
14 Police determined were in violation of the Shangri-la Police Department General
15 Procedures 030: "Harassment Prevention Policy, and 405: "Use of Mobile Data
16 Terminals " (MDT).

17 After an internal investigation, the Chief of Police found the messages to be
18 derogatory and critical of a fellow city employee and in violation of General Procedures
19 030 and 405. General Procedure 030.4 - Definitions: Visual Forms of Harassment is
20 defined as **"the posting of derogatory posters, notices, bulletins, cartoons,**
21 **electronic transmissions on the MDT..."** (JT EX A). Procedure 405 prohibits the
22 transmission of any message that is of a derogatory nature or is demeaning in its
23 content and further restricts the use of the MDT to official police business. General
24 Procedure 405, in pertinent part states: Section V (B) - **"Messages that are of a**
25 **sexual nature, racist, or otherwise critical of any employee of the City or member**
26 **of the general public are strictly forbidden"** (JT EX B). Based upon his finding that

1 the Grievant had violated General Procedures 030 and 405, the Chief of Police
2 proposed to discipline the Grievant by reducing him from Police Officer Salary Step 5 to
3 Police Officer Salary Step 4.

4 On September 19, 2001, on behalf of the City Manager, the Human
5 Resources/Risk Management Director, held a Skelly hearing (AIC # 2001-28). In a
6 decision dated October 1, 2001, the hearing officer determined: "there is sufficient
7 evidence to support a finding that you violated Procedures 030 and 405" (JT EX D).
8 Based on this finding, the hearing officer sustained and affirmed a reduction from Salary
9 Step 5 to Salary Step 4 as appropriate discipline, effective October 7, 2001.

10 The parties stipulated that the underlying facts and circumstances surrounding
11 the unauthorized use of the MDT are not in dispute and that
12 the Grievant did on July 11, 2001, send two messages over the MDT in violation of
13 General Procedures 030 and 405. The two messages in question were sent to and
14 received by Dispatch Supervisor T. It is most constructive to use the undisputed
15 interview and testimony of Ms. T in reference to the content of messages as she was the
16 initial recipient of them. "I will bring you back this paperwork after the Wicked Witch of
17 the West leaves" (JT EX L), (TR: 41:13). "But she takes the cake" (JT EX L). No, she
18 takes the cake"? (TR: 3:4:5:6:7) Arbitrational note is taken that the differences in the
19 second message between *but* and *no* is of no significance, since the latter one is a
20 reading of the actual transmission of July 11, 2001, while the former is from the memory
21 of Ms. T. They are substantially the same.

22 The subject of this Arbitration is the appropriateness of the discipline imposed
23 for violation of General Procedures 030 and 405 and whether it meets the just cause
24 standard.

POSITION OF THE CITY OF SHANGRI -LA

The City contends that the Grievant's violation of General Procedures 030 and 405 is a pattern of poor judgment exercised by the Grievant. In 2001, the Grievant was recommended for disciplinary action for the exercise of poor judgment on two separate occasions. In the first instance, on February 23, 2001, a ten-hour suspension without pay was imposed, for violation of Shangri-la Police Department General Procedure 609.5, "Mandatory Documentation" (JT EX F). The essence of the rule violation is that the Grievant failed to take a police report of a stabbing, which is required by General Procedure 609.5. The second instance, on July 19, 2001, a three (3) ten-hour suspension without pay was imposed, for violation of Shangri-la Police Department Rules and Regulations Manual, Section 3.21 – "Assistance to Other Personnel" and Section 3.13, Subsection B - "Providing Information" (JT EX E). The Grievant was accused of failing to investigate a Driving Under the Influence allegation concerning a bicyclist involved in a traffic accident when requested to do so. Each of these disciplinary actions, including the current one, has as its common dominator the fact that the Grievant failed to exercise good judgment and to follow the established general procedures. As an experienced Police Officer these lapses on the part of the Grievant cannot be excused, as they constitute a serious disregard for the responsibilities and duties the Grievant has as a Police Officer.

The Grievant is aware of the General Procedures of the Shangri-la Police Department and, particularly, Procedures 030 and 405. Despite his knowledge of them, the Grievant did on July 11, 2001 send two inappropriate messages on MDT in violation of Procedures 030 and 405. Sending these prohibited messages disrupted the Dispatch Center and caused concern and upset on the part of those Dispatchers who came into contact with the messages. The individual to whom the remarks referred to experienced particular anguish and embarrassment and was unable to sleep at the conclusion of her

1 overtime shift. The Dispatchers on duty when the incident occurred spent a great deal of
2 time discussing the messages and their offended feelings, resulting in a disruption of
3 the Dispatch Center.

4 In view of the fact that this is one of three disciplinary actions within a five (5)
5 month period of time the reduction in salary step is proper discipline. Imposition of this
6 salary step reduction should be viewed in context and totality of the Grievant's entire
7 disciplinary record and is consistent and supportive of progressive discipline.

8 **RELIEF ASSOCIATION**

9 The facts that give rise to the assessment of a disciplinary reduction in salary
10 step is not in dispute. The Grievant readily admits that his actions on July 11, 2001 were
11 a violation of General Procedures 030 and 405 and were not proper conduct in the work
12 place. Throughout his tenure, the Grievant has never been attributed a similar incident,
13 nor is there a history of this type of behavior. It is out of character for the Grievant to
14 engage in this type of deportment. When confronted with the fact that he had sent an
15 inappropriate MDT message, he admitted to his conduct and accepted responsibility.

16 What occasioned the Grievant to react so uncharacteristically is the former
17 dating relationship that the Grievant had with Dispatcher Z. Upon the termination of their
18 dating relationship, the Grievant expressed to Z that he desired no personal
19 communication with her. In the view of the Grievant, communication between them
20 should be only that which is necessary to conduct police business and, should be absent
21 personal greetings and salutations. Prior to the incident of July 11, 2001, the Grievant
22 had successfully communicated police business with Dispatcher Z under these
23 conditions and did so without repercussions.

24 On the Morning of July 11, 2001, in the course of his duties, the Grievant
25 entered the Dispatch Center. During this visit Dispatcher Z said "Hi" to the Grievant, who
26 didn't return or acknowledge the greeting. Shortly thereafter the Grievant left the

1 Dispatch Center to return to patrol duty. Although this is an innocent sounding greeting,
2 it upset the Grievant, because he wanted no personal communication with her. He was
3 not at all desirous of any type of friendship and interpreted this greeting as a means of
4 establishing a non work-related discourse.

5 It was while on patrol duty that the improper MDT message was transmitted by
6 the Grievant to Dispatch Supervisor T. in response to a request that certain paper work
7 be returned to the Dispatch Center. It is clear that this transmission was improper, but it
8 was sent to T. and not Z. It was when the message was circulated amongst the
9 Dispatchers that it became apparent that it referred to Z. Prior to that conclusion, T. had
10 responded in a humorous manner by asserting that "they were all witches". Once it
11 became clear to Z that she was the subject of this message, she used the MDT to
12 respond. For her improper use of the MDT, Z was counseled, while the Grievant
13 received a significant reduction in pay.

14 The Grievant has no prior history of sending any kind of offensive messages and
15 has no disciplinary record to that effect. Essentially, this issue is a matter of equity. The
16 reductions in pay suffered by the Grievant do not reflect the principles of progressive
17 discipline or just cause. The conduct of the Grievant was not willful but spontaneous.

18 General Procedure 030 provides for either formal or informal resolution of this
19 type of dispute. The individual to whom the remark was directed and those who came
20 into contact with the transmission, unanimously have elected to resolve this informally.
21 Since the City established this procedure it should follow it and allow this informal
22 resolution to occur. Implementation of an informal resolution more accurately reflects a
23 lesser degree of offense. A reduction in salary step until the Grievant's next evaluation
24 is far too harsh a penalty for this infraction.

DISCUSSION

Within a five (5) month period of time the Grievant had been disciplined three times for violations of the General Procedures of the Pomona Police Department. Under the just cause theory it is necessary to distinguish the severity of these offenses in order to evaluate their nexus to the propriety of the current penalty. This analysis is required because a fundamental precept of the City's case is that the discipline imposed is progressive and is consistent with the concept of just cause. If this standard is met, the City contends the penalty should not be vacated or modified. A factual determination of the validity of the two prior disciplinary actions is not required or efficacious. Since the parties have stipulated that the two prior disciplinary actions are part of the Grievant's record, that is all that is required here.

The first suspension for ten hours, on February 23, 2001, concerned the Grievant's failure to take a police report of a stabbing. The second suspension for thirty hours, on July 19, 2001, concerned the Grievant's failure to investigate a driving under the influence charge. Generally, disciplinary suspensions can be described as fitting into two main categories, either for behavior or performance. The first two suspensions that were levied against the Grievant can best be categorized as "for performance". Simply stated, these incidents involved issues of public safety and were of a sufficient magnitude to warrant the City to impose substantial discipline. What is relevant here is that the suspensions of February 23 and July 19, 2001, are *for performance*, not for *behavior*. These violations impacted the general public and have consequences and ramifications that exceed issues beyond the confines of the workplace. Conversely, the current matter primarily affects employees of the Dispatch Center and not members of the general public. No evidence was submitted that indicated that this incident compromised the safety of the general public or services provided to them.

1 The current disciplinary action is the subject of the Grievant's behavior and it is
2 not the same as the two prior events. All of these disciplinary actions share a
3 commonality in that they are for violations of the General Procedures of the Pomona
4 Police Department. But these three violations vary greatly in circumstance, severity and
5 impact. The commonality of the three events, standing alone, is not sufficient to
6 independently support the length of the disciplinary action. It is incumbent to judge the
7 instant case according to its own merits, since this arbitration concerns the length of the
8 disciplinary penalty and not if a disciplinary penalty is warranted. The testimony of those
9 Dispatchers that received the Grievant's message indicated that this was not common or
10 expected behavior on the part of the Grievant. In fact, the testimony offered indicates
11 that this was a one-time occurrence and no evidence was presented to impeach this
12 testimony. The affected Dispatchers universally testified that at no time since or prior to
13 the incident of July 11, 2001 has the Grievant engaged in such behavior. This gives
14 credibility to the Grievant's explanation of events. In essence, the Grievant testified that
15 he lost his temper momentarily and he regretted doing so. When Dispatcher Z sent him
16 an unauthorized MDT message he didn't respond to it. Since the Grievant didn't
17 respond, Dispatcher Z initiated contact by cell phone and in the course of their
18 conversation he apologized for his outburst. Dispatcher Z testified to the same set of
19 facts and strongly indicated that she wished the matter be handled informally.

20 The City is legitimately concerned that the Grievant's behavior is such that the
21 totality of his conduct must be given greater weight. The one-time unauthorized use of
22 MDT to send an inappropriate message is not sufficient reason to impose a penalty of
23 this duration. The City contends that when viewed in the entire context of the Grievant's
24 behavior, his repeated violations display a blatant disregard for the Rules and
25 Regulations of the Police Department. However, consideration to the circumstances and
26 the gravity of the offense must be given. Ample testimony was offered that the Grievant

1 behaved as he did spontaneously in conversation with a third party. When the Grievant
2 was given an opportunity to reply to Z's MDT, he didn't and recognized the error that he
3 made. Pivotal to the theory of progressive discipline is that the penalty must be
4 reasonable in view of the offense. (*)

5 It is not required that, to be effective, progressive discipline must always carry an
6 increased penalty. Progressive discipline, by its very nature and construction, is
7 designed to rehabilitate the offending employee. The City clearly reserves the right,
8 balanced by grievance procedure, to impose severe discipline up to and including
9 termination for offenses that so warrant.

10 The duration of the penalty, a reduction in the salary step, is governed by the
11 Grievant's anniversary date, rather than the severity of the offense. Progressive discipline
12 is not a mechanical exercise whose penalty finds refuge in the circumstance of an
13 employment date. Little rehabilitative value can be found in such a penalty, as its
14 relationship to the offense is distant. In some cases, the penalty for a similar offense
15 may be greater or less dependent upon the individual's anniversary date.

16 The offense that the Grievant admits to having committed is far less serious than
17 the prior two disciplinary actions. No compelling evidence was offered that the
18 Grievant's actions were willful misconduct or a continuous disregard for the rule
19 governing MDT use. If anything, his actions were immature but lacked the necessary
20 element of willful disobedience.

21 The City contends that the length of the reduction is necessary in order to gain
22 the cooperation and compliance of the Grievant to the procedures of the Police
23 Department. The fundamental element of discipline is that it must fit the offense. Should

24 (*) Phelon , 75 LA 709 (Keefe, 1969).

1 the Grievant face discipline at a future date, the fact of this violation will be evaluated.
2 The evidence submitted fails to rise to the level to justify the severity the salary
3 reduction.

4 In determining a penalty it is proper to consider the prior two disciplinary
5 offenses. The Association contends that the penalty should be minimal, based on the
6 wishes of the affected employees and the fact that other employees were counseled for
7 improper MDT use, consistent with the informal option contained in General Procedure
8 030.

9 This position ignores the fact that the Grievant has suffered discipline within a
10 very short period of time. Had this been the only instance of discipline, the Association's
11 contention would bear considerable weight. However, this is not the case. The Grievant
12 through his own actions has placed stains on his record, from the serious to the minor.

13 In consideration of the nature of the offense a reduction in the penalty is proper.
14 The penalty is mitigated for the following reasons: First, the offense itself is not willful
15 and is minor. Second, no compelling evidence was produced that this is a continuing
16 violation or a pattern of willful or deliberate misconduct. Persuasive evidence was
17 produced that established that this was a one-time spontaneous occurrence. Third,
18 weight must be given to the Grievant's length of service which up until recently was
19 without significant discipline. Fourth, the length of the salary step reduction is a function
20 of the Grievant's anniversary date and not the magnitude of the offense.

21 **REMEDY**

22 The Grievant's salary step reduction is to be modified to reflect a reduction from
23 Step 5 to Step 4 for a period of three months from October 7, 2001. (JT EX D) It is the
24 purpose of this award, that the Grievant should suffer this reduction for a full three
25 calendar month period and the date of October 7, 2001 or the actual date of the
26 implementation of the reduction is to be used. The Grievant is to be restored all salary,

1 including overtime and other salary compensation, after a reduction for three full
2 calendar months is calculated. This award specifically excludes any retroactive
3 adjustment to health and welfare benefits.

4 **AWARD**

5 The grievance is sustained and modified in part. The Grievant is to suffer a
6 reduction in Salary Step 5 to Salary Step 4 for a full three calendar months, not to his
7 anniversary date. The remaining period of time is to be restored as described in the
8 remedy above. The Arbitrator will retain jurisdiction for a period of thirty days from
9 issuance of this award, to resolve any disputes regarding its implementation.

John F. Wormuth
Arbitrator

June 25, 2002